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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. PAULINO HERRERA-HERNANDEZ, Defendant.	Case No.: 14-CR-3571-LAB **United States' Trial Memorandum** Date: March 10, 2015 Time: 9:00 a.m. Honorable Larry A. Burns

The Plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Laura E. Duffy, United States Attorney, and Benjamin Katz, Assistant United States Attorney, hereby files its Trial Memorandum.

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I

STATEMENT OF THE CASE

A. The Charge

On December 11, 2014, the defendant Paulino Herrera-Hernandez ("Defendant"), waived indictment and was charged in a one-count Information with being a deported alien found in the United States. Defendant was arraigned on the Information and entered a plea of not guilty.

B. Trial Status

A trial is scheduled for March 10, 2015 before the Honorable Larry A. Burns, United States District Judge. The United States expects its case-in-chief to last approximately one day.

C. Defense Counsel

Defendant is represented by appointed counsel, Federal Defender Amrutha Jindal.

D. Defendant's Custody Status

Defendant is in federal custody.

E. Interpreter

The United States will not require the assistance of an interpreter.

F. Jury Waiver

Defendant has not filed a jury waiver. However, based on representations from defense counsel, the United States expects that the Defendant will file a jury waiver in advance of trial.

G. Pretrial Motions

On January 15, 2015, Defendant filed Motions to Compel Discovery, to Preserve Evidence, and for Leave to File Further Motions. On January 21, 2015, The United States filed Motions for Fingerprint Exemplars, for Reciprocal Discovery, and for Leave to File Further Motions.

On January 29, 2015, the Court held a Motion Hearing/Trial Setting. The Court found Defendant's Motion to Compel Discovery moot, and denied without prejudice Defendant's Motion for Leave to File Further Motions. The Court granted the United States' Motions for Reciprocal Discovery and for Fingerprint Exemplars and denied without prejudice the United States' Motion for Leave to File Further Motions.

On February 23, 2015, Defendant filed a Motion to Dismiss the Information Due to an Invalid Deportation. The United States will file its response prior to trial.

The United States will file its Motions in Limine on March 5, 2015.

H. Stipulations

The parties have not yet agreed to any stipulations. If the parties reach agreement on stipulations in advance of trial the United States will supplement this memorandum.

I. Discovery

The United States has complied with its discovery obligations. To date, Defendant has not provided reciprocal discovery.

II

STATEMENT OF FACTS

A. Apprehension

On November 15, 2014, at approximately 2:00 a.m., United States Border Patrol Agent Justin Clare responded to a seismic intrusion device approximately five miles east of the Otay Mesa Port of Entry and eight miles north of the United States/Mexico boundary. After searching the area, Agent Clare observed Defendant and another individual attempting to conceal themselves in some brush.

Agent Clare asked Defendant about his nationality and citizenship, and he responded that he was a citizen and national of Mexico. Clare then asked Defendant if he had any immigration documents, and Defendant responded that he did not. Defendant was arrested and transported to the Border Patrol station, where fingerprint checks confirmed that he was a citizen of Mexico who had previously been deported.

At the Border Patrol station, Defendant was interviewed by Border Patrol Agent Araceli Barba De La Cruz. This interview was videotaped and witnessed by Border Patrol Agent Raymond Miller. Defendant waived his Miranda rights and stated that he was a citizen and national of Mexico, that he had previously been deported, and that he had not applied for permission to re-enter legally. Defendant stated that he last entered the United States on November 13, 2014 by walking through the mountains in an area between Tijuana and Tecate.

B. Immigration and Criminal History

Defendant pleaded guilty to being a deported alien found in the United States in 11-cr-1302. On May 16, 2011, this Court sentenced him to five years probation.

Defendant has been apprehended by immigration authorities on 12 occasions. He has been deported via expedited removal on June 25, 2008 and February 9, 2009. He was removed via reinstated expedited removal on March 8, 2011 and May 18, 2011.

Defendant’s May 18, 2011 departure was verified by Immigration Enforcement Agent Guillermo Reza.

III

WITNESSES

The United States expects to call the following witnesses, although it reserves the right to change the order of these witnesses, substitute witnesses, add, or omit one or more witnesses.

1. Border Patrol Agent Justin Clare
2. Border Patrol Agent Araceli Barba De La Cruz
3. Border Patrol Agent Raymond Miller
4. Immigration Enforcement Agent Guillermo Reza
5. Border Patrol Agent Joseph Moore (A-File custodian)
6. Fingerprint Expert David Beers

IV

EXHIBITS

The United States will provide a complete exhibit list prior to trial and allow defense counsel to examine the exhibits before trial. The United States requests that defense counsel examine the exhibits before trial and also requests time to examine the defense exhibits before trial in order to expedite the proceedings.

1. Apprehension Location Maps/Photos
2. Documents Certified from Defendant's A-File, including
    a. Notice and Order of Expedited Removal, dated 2/23/2009
    b. Notice of Intent/Decision to Reinstate Prior Order, dated 5/17/2011
    c. Departure Verification, dated 5/18/2011
    d. Warrant of Removal, dated 5/17/2011
    e. Videotape of Sworn Statement, dated 11/15/2014

3. Documents Certified from U.S. District Court, including Transcript of Guilty Plea, dated 4/19/2011

4. Defendant’s Fingerprint Cards

V

APPLICABLE LAW

A. 8 U.S.C. § 1326: Attempted Reentry by a Deported Alien

The United States must prove beyond a reasonable doubt each of the following elements:

1. The defendant was removed from the United States;
2. Thereafter, the defendant voluntarily entered the United States;
3. At the time of entry, the defendant knew he or she was entering the United States;
4. The defendant as found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and
5. The defendant was an alien at the time of the defendant’s entry into the United States.

Ninth Circuit Model Criminal Jury Instructions § 9.8 (2013).

VI

PROPOSED VOIR DIRE

Should the Defendant not file a jury waiver, the United States requests that the following voir dire questions be addressed to the jury panel in addition to the Court’s standard jury questions:

1. Of those of you who have sat on criminal juries, whose jury was unable to reach a unanimous verdict?

2. The law requires the government to prove its case against the defendant beyond a reasonable doubt. If you are selected, would you want the government to prove its case by a higher standard of proof, say beyond any possible doubt?

3. Do you feel you have to see something with your own eyes in order to be convinced beyond a reasonable doubt that it happened?

4. Does everyone understand that as a juror your duty is to apply the law regardless of whether you agree with it?

5. Has anyone had any training in the law? If so, please explain.

6. Does anyone think that, regardless of the strength of the evidence, they will have trouble deciding whether the Defendant is guilty or not guilty?

7. Does anyone have religious or moral beliefs that would prevent them from making a decision about guilt or innocence?

8. Does everyone understand that as a juror you are not to consider prejudice, pity, or sympathy in deciding whether the Defendant is guilty or not guilty?

9. The Court is responsible for determining and imposing a fair sentence if a defendant is found guilty. Will you be able to set aside any consideration of the sentence in deciding the facts of this case?

10. Does everybody understand that a defendant is entitled to a fair trial? Does everybody understand that the United States is also entitled to a fair trial?

11. Has anyone had any disputes with any agency of the United States Government?

12. Has anyone, or a family member, had an unpleasant experience at the United States border or with personnel from

the Border Patrol, the Customs and Border Protection, or the Department of Homeland Security (formerly the INS)?

13. The defendant in this case is charged with being a deported alien found in the United States. Does anybody have strong feelings or opinions about U.S. immigration laws that would prevent him/her from viewing the evidence impartially?

14. Does anyone believe that the immigration laws are too harsh or that everyone should be allowed to enter the United States?

VII

JURY INSTRUCTIONS

Should Defendant not file a jury waiver, the United States will submit proposed jury instructions under separate cover.

Dated: March 3, 2015

LAURA E. DUFFY
United States Attorney

s/Benjamin J. Katz
Benjamin J. Katz
Assistant United States Attorney